No. 90-674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, *et al.*,

Petitioners,

v.

ROBERT GUIDRY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do union officials' threats of violence and denial of hiring hall referrals, in retaliation for a union member's exercise of his free speech rights under section 101(a)(2) of the LMRDA, "infringe" that member's free speech rights?

2. Did the court of appeals correctly hold that damages may be awarded for emotional distress when union officials have deprived a union member of work and threatened him with physical injury in retaliation for his exercise of his right of free speech within the union?

3. Did the court of appeals correctly hold that a district court has discretion to award modest punitive damages when union officials act with "actual malice" in retaliating against political dissidents?

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STATEMENT

Respondent Robert Guidry and eleven other members of petitioner International Union of Operating Engineers Local 406 ("Local 406") sued petitioners Local 406 and four of its officers — petitioners Peter Babin III, Willard Carlock, Sr., Columbus Laird, and Don Schiro (the "local officers") — alleging violations of the duty of fair representation and the Union Members' Bill of Rights, which is Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411 *et seq.* ("LMRDA"). The plaintiffs alleged that some of them had opposed the incumbent officers in intra-union

elections and in other political disputes within the union, that some of them had simply refused to contribute to the intra-union political campaigns of the incumbents, and that some of them had cooperated with criminal investigations into the officers' conduct.[1] In retaliation for this conduct, plaintiffs and their families were subjected to numerous threats of physical harm, including threats against their lives, and were blacklisted at the union hiring hall. In addition, respondent Guidry was expelled from the union, to which he had belonged since 1949, for having crossed a picket line established at a non-union contractor that employed him during the period when he was frozen out of the union hiring hall.

After a bench trial lasting several weeks, the district court entered detailed findings upholding plaintiffs' claims of physical and economic retaliation. Appendix to the Petition ("Pet. App.") at A53-A68. The court concluded that this retaliation violated the duty of fair representation ("DFR"), Pet. App. A68-A69, plaintiffs' right of free speech under section 101(a)(2) of the LMRDA, Pet. App. A70-A71, and plaintiffs' right not to be disciplined without due process under section 101(a)(5) of the LMRDA or for an improper purpose under 609 of the LMRDA. Pet. App. A71-A72. The court also held that, because the membership meeting at which respondent Guidry was expelled had been packed with supporters of petitioner Carlock, after petitioner Laird had telephoned them to ensure that they would attend to vote against respondent Guidry, his expulsion violated the "fair hearing" requiring of section 101(a)(5). Pet. App. A78.

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[1]Petitioners Carlock and Laird, among others, were convicted of various offenses, including racketeering, extortion, illegal payments from employers, and obstruction of justice. Appendix to the Petition for Writ of Certiorari at A39-A-40.

Because the district judge believed that the statute of limitations for DFR and LMRDA violations alike was six months, he based his damages awards on that time period. *Id.* A72. He awarded all of the twelve plaintiffs together almost $25,000 in back wages, including $5,310.50 for respondent Guidry, *id.* A72-A76; $58,000 in damages for mental and emotional distress caused by both the loss of livelihood and the threats of physical harm, including $20,000 for respondent Guidry; *id.* A76-A78; and punitive damages of $132,000, including $11,000 for respondent Guidry. *Id.* A79-A82. Finally, the district court ordered petitioner Local 406 to pay plaintiffs their reasonable attorney fees, both because they had acted toward plaintiffs with bad faith, and because plaintiffs' victory had conferred a common benefit on the membership as a whole that should be taxed against the union treasury. *Id.* A82-A83.

Petitioners appealed only the judgment in favor of respondent Guidry, and Guidry cross-appealed. *Id.* A11 n.1, A16. The court of appeals affirmed the district court's holdings with respect to liability, and specifically upheld the district court with respect to each of Guidry's theories: the duty of fair representation, *id.* A24 n.5, free speech under section 101(a)(2), *id.* A27 n.6, A29, A34, and discipline without due process under section 101(a)(5) and for an improper purpose under section 609. *Id.* A25-A32. In addition, the court held that, in light of this Court's intervening decision in *Reed v. UTU*, 109 S. Ct. 424 (1989), and in light of the fact that this case, like *Reed*, involved a claim under section 101(a)(2) of the LMRDA, the statute of limitations was properly one year, not six months. Pet. App. A34-A35. Accordingly, the court directed the district court to recompute both punitive and actual damages in light of the new limitations period and

other considerations discussed in its opinion. *Id.* A35-A39. However, the court reversed the award of attorney fees on the grounds that fees may be awarded for bad faith only when the bad faith is exhibited during the litigation, not where the bad faith is part of the underlying action, and that attorney fees are never available in LMRDA cases on the common benefit theory when the plaintiff receives an award of damages. *Id.* A39-A41.

Shortly after the court of appeals issued its decision, this Court decided *Breininger v. Sheet Metal Workers Local 6*, 110 S. Ct. 424 (1989). In *Breininger*, the court held that, although denial of hiring hall referrals may violate the duty of fair representation if done in an arbitrary fashion, even retaliatory denial of referrals does not constitute "discipline" of union members under sections 101(a)(5) and 609, unless the union as an entity has taken responsibility for the action. Petitioners then sought review in this Court of the ruling below that Guidry had been disciplined; although the same damages questions as those contained in this petition were presented there as well, petitioners did not object to the court of appeals' ruling with respect to sections 101(a)(2) and 102. This Court granted certiorari and remanded solely to permit reconsideration in light of *Breininger*. Pet. App. A9.

On remand, the court of appeals, acting without the benefit of briefs from the parties, first remanded the case to the district court, directing it to decide whether the hiring hall retaliation had been authorized by the union as a collective entity. *Id.* A7-A8. Respondent, concerned that this remand order might be read to require such findings as a condition of reaffirming petitioners' liability under section 101(a)(2), sought rehearing to clarify this point. The court of appeals then revised its

ruling, making clear that the finding of liability under section 101(a)(2) in its earlier opinion remained effective, because it had not been undermined by *Breininger*. Pet. App. A4. Thus, the district court was required to reopen the question of liability only under section 101(a)(5). Pet. App. A3.

REASONS FOR DENYING THE WRIT

A. The Finding of Liability Under Sections 101(a)(1) and 101(a)(2) Does Not Conflict With Any Decision of This Court or of Any Court of Appeals.

In *Breininger v. Sheet Metal Workers Local 6*, 110 S. Ct. 424 (1989), this Court held that, when union leaders retaliate against members for having exercised intra-union political rights, by denying them referrals from the union hiring hall, the members have a claim for violation of the duty of fair representation. The court also held, however, that, at least where the retaliation is effectuated by the union leadership for their own interests, without invoking the formal decision-making procedures of the union or imposing any stigma for having allegedly violated legitimate union rules, there is no "discipline." Accordingly, in those circumstances there can be no claim under section 101(a)(5) of the LMRDA, which requires a union to afford members due process before imposing discipline, or under section 609 of the LMRDA, which forbids discipline for having exercised rights under the LMRDA. *Id.* at 438-440. The Court expressly reserved the question of whether such retaliation would "infringe" the members' free speech rights under sections 101(a)(2) and 102 of the LMRDA, because the union member had neither alleged a violation of section 101(a)(2) in his complaint, nor presented the question as to either section in his petition for a writ of certiorari. *Id.* at 440 n.18.

Following the remand order in this case, the court of appeals in turn remanded the section 101(a)(5) issue for further consideration by the district court in light of the standard set by *Breininger*, and that issue is not at issue on this petition. Rather, the only issue on liability in the petition is whether the lower court's holdings with respect to sections 101(a)(1) and (2) were correct, issues that this Court expressly reserved in *Breininger* because the petitioner there failed to raise them.

The far broader question presented by the petition is not at issue here. Contrary to petitioners' first Question Presented, Petition at i ("Pet. i"), the court of appeals did not hold that any hiring hall discrimination is automatically actionable under sections 101(a)(1) and 101(a)(2). Rather, it upheld the violation here which involved adverse treatment at the hiring hall, as well as threats of violence, that was based on retaliation for a member's exercise of his rights under those sections, by participating in union political debates and by refusing to lend his support to the incumbents' election campaigns.

Petitioners do not point to any decision of this Court, or indeed of any court of appeals, that conflicts with that holding. As petitioners concede, the Sixth Circuit agrees with the Fifth Circuit in this regard, Pet. 5 n.3, *citing Murphy v. Operating Engineers Local 18*, 774 F.2d 114, 123 (6th Cir. 1985). Petitioners cite only a district court opinion from within the Sixth Circuit, Pet. 6, and perform an arcane dissection of a minor dictum from this Court's opinion in *Finnegan v. Leu*, 456 U.S. 431, 435 (1982), in which the Court noted the problem that denial of membership may lead to loss of livelihood, but which petitioners would turn into a bar against redress for any sanctions that directly affect the member's livelihood. Pet. 6.

In short, petitioners have not shown either that there is any

disagreement among the lower courts about the viability of the cause of action under sections 101(a)(1) and 101(a)(2) for threats of violence or hiring hall retaliation based on the exercise of rights under those sections, or that the courts below have committed some error that is so egregious that review should be granted in the absence of a disagreement among the lower courts. Accordingly, there is no reason to review the first Question Presented.

B. The Damages Issues Raised By The Petition Involve Neither an Important Question Of Law Nor A Significant Conflict Among The Lower Courts.

1. In *IBEW v. Foust*, 442 U.S. 42 (1979), the Court held that punitive damages may not be awarded against unions for breach of the DFR, while expressly reserving the issue of whether such damages may be awarded under the LMRDA. *Id.* at 47 n.9. Justice Blackmun's concurring opinion approved of this reservation, while expressing the *fear* that the opinion might imply that punitive damages were unavailable in LMRDA cases. No Justice advocated a prohibition on punitive damages in such cases, and the circuits, both before and since *Foust*, are unanimous in approving punitive damages in some LMRDA cases. *E.g.*, *Quinn v. DiGiulian*, 739 F.2d 637, 651 (D.C. Cir. 1984); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1380 (8th Cir. 1978); *see also Petramale v. Laborers Local 17*, 847 F.2d 1009, 1013 (2d Cir. 1988). Moreover, punitive damages may be awarded in cases involving violations of civil rights under 42 U.S.C. § 1983, *Smith v. Wade*, 461 U.S. 30 (1983), and the LMRDA is most closely analogous to section 1983, not to the DFR, the National Labor Relations Act and the other statutes on which petitioners rely.

Pet. 8-10. *Reed v. UTU*, 109 S. Ct. 621, 629-630 (1989). Accordingly, the availability of punitive damages is not a substantial question warranting this Court's review.[2]

2. Petitioners do not suggest that there is any disagreement among the lower courts about whether damages are available in LMRDA cases for emotional distress, and in fact the circuits are unanimous in upholding such damages in appropriate cases. *Bise v. IBEW Local 1969*, 618 F.2d 1299, 1305 (9th Cir. 1979); *Rodonich v. Laborers Local 95*, 817 F.2d 967, 977-978 (2d Cir. 1987); *Simmons v. Textile Workers Local 713*, 350 F.2d 1012, 1020 (4th Cir. 1965). Petitioners try to suggest a split in the circuits by arguing for a requirement that a plaintiff first show a physical manifestation of the emotional strain. Pet. 14-15. The court below, like the Ninth Circuit cases on which it relied, agrees with the Second Circuit that emotional distress damages should not be awarded absent a showing that the union member has suffered tangible injuries. Whether loss of wages is a sufficient showing of tangible injury, or whether a doctor's testimony or the plaintiff's own testimony about sleepless nights should also be required, is scarcely a question of sufficient moment to warrant this Court's attention. Nor, indeed, does the Court have jurisdiction to decide whether a showing of physical injury is required,

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[2]Petitioners cite one case as having "questioned" the availability of punitive damages in LMRDA cases. Pet. at 11 n.9, *citing McCraw v. Plumbers*, 341 F.2d 705, 710 (6th Cir. 1965). That case involved a union member's claim for lost wages incurred before his suspension from membership, which the court denied on the ground that only damages that are "directly and proximately caused" by an LMRDA violation may be awarded. Although it is not clear that McCraw was seeking punitive damages, the same court later indicated that *McCraw* implied that punitive damages would be unavailable, while simultaneously questioning the "present viability" of that aspect of *McCraw*. *Shimman v. Frank*, 625 F.2d 80, 101 (6th Cir. 1980).

because petitioners did not raise this distinction in their appeal to the Fifth Circuit as a basis for overturning the award of damages for emotional distress in the two pages of their brief that dealt with that issue.[3]

Here, the lower courts found that, because he failed to kowtow to the union's political leaders, Guidry was subjected to unremitting pressure through expulsion from the union at a union meeting stacked with supporters of the incumbents, hiring hall discrimination, attempts to have him fired from the jobs he did obtain, late night telephone calls, threats of physical injury delivered face-to-face on the job, and even threats against his life. Even the Second Circuit has held, in a DFR case, that a union may be liable for emotional distress damages absent physical injury where the union's conduct was outrageous, which was certainly the case here. *Baskin v. Hawley*, 807 F.2d 1120, 1133-1134 (2d Cir. 1986). Nor is there any basis for concluding that the award here was the product of a runaway jury -- the case was tried to the bench, and Guidry received a modest award of $20,000 for emotional distress. Whatever the proper standard for claims for emotional distress under the LMRDA, this is the sort of case in which such damages ought to be available, and neither the availability of emotional distress damages, nor the question of the proper standard, warrants review here.

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[3]A copy of the entire brief, pages 41 to 43 of which address emotional distress damages, has been lodged with the Clerk.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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